

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

REEVER SHEARS)	
Claimant)	
VS.)	
)	Docket No. 180,398
CITY OF LAWRENCE)	
Respondent)	
Self-Insured)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Kansas Workers Compensation Fund and respondent requested review of the Award entered by Administrative Law Judge Floyd V. Palmer dated May 21, 1996. The Appeals Board heard oral argument on November 5, 1996, in Topeka, Kansas.

APPEARANCES

Claimant appeared by his attorney, W. Fredrick Zimmerman of Kansas City, Kansas. Respondent, having reached an agreement with the Workers Compensation Fund, appeared not. The Kansas Workers Compensation Fund (Fund) appeared by its attorney, Eugene C. Riling of Lawrence, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, it was announced at oral argument by counsel for the Fund that an agreement had been reached between respondent and the Fund as to their respective liability. However, the exact nature of that stipulation has not yet been placed in evidence.

ISSUES

The sole issue remaining for determination by the Appeals Board concerns the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds that the Award entered by the Administrative Law Judge should be affirmed.

Respondent and the Fund do not dispute that claimant suffered personal injury by accident arising out of and in the course of his employment on October 15, 1990. However, they contend that claimant's injury and resulting disability is limited to his left lower extremity. Accordingly, it is the position of respondent and the Fund that the disability award in this case should be limited to a scheduled injury to the leg pursuant to K.S.A. 1990 Supp. 44-510d. They argue in the alternative that if claimant should be found to possess a whole body impairment, then he should be given a high work disability, pursuant to K.S.A. 1990 Supp. 44-510e, as opposed to the permanent total disability awarded by the Administrative Law Judge.

Claimant contends, and the Administrative Law Judge so found, that he is entitled to permanent disability benefits based upon an injury to the body as a whole. Claimant was injured when he was pinned between the back of a garbage truck and a post. He sustained a crush-type injury to his left leg with a fracture of the bone. He was also knocked from the back of the garbage truck and landed in a seated position on the concrete. There is some dispute as to whether or not claimant injured his back in the initial accident. Although the hospital records do not specifically indicate a back injury, claimant's back was x-rayed. Nevertheless, the primary focus of treatment and of claimant's complaints pertained to his leg. Claimant alleges that his back became symptomatic when he started walking with crutches and subsequently with a cane. However, it was approximately one year from the accident date before claimant's complaints of back pain appear in the medical records. Nevertheless, the medical testimony in this case relates the low back condition to the October 15, 1990, injury due to the claimant's altered gait.

Board-certified orthopedic surgeon William A. Bailey, M.D., was claimant's treating physician. He relates the development of claimant's back condition to the subject accident. As claimant's knee got better and claimant became more ambulatory, his back became more symptomatic and limiting. Claimant had a preexisting back condition which was aggravated and became significantly more symptomatic because of the leg injury and the resulting abnormal gait pattern, according to Dr. Bailey. Although Dr. Bailey had not been fully aware of the extent of claimant's prior back problems before giving his deposition testimony, he did not change his opinions when presented with the complete history.

The record also contains a report of the independent medical evaluation performed by orthopedic surgeon Mark Bernhart, M.D., on February 20, 1995. He likewise found claimant to have an antalgic gait with varus deformities of both knees, worse on the left than the right. His impression was of a healed fracture with post-traumatic osteoarthritis in the left knee, together with chronic lumbar strain syndrome with underlying lumbar spondylosis and degenerative disc disease with right leg radiculitis. He considered claimant "to be 100 percent physically disabled from doing his prior jobs and essentially from any occupation." He attributed all of his permanent functional impairment rating, which included a "5% whole body permanent physical impairment and loss of function as a result of the aggravation of his degenerative disc disease of his lumbar spine" to the accident of October 15, 1990.

The expert medical opinion testimony finding the accident and the resulting altered gait caused an aggravation of claimant's back condition is uncontroverted. Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy. It is otherwise ordinarily regarded as conclusive. See Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976) . The Appeals Board finds claimant's back injury to have arisen out of and in the course of his employment as the direct and natural result of his October 15, 1990, accident.

Claimant presented the expert vocational testimony of Michael J. Dreiling. In his opinion, claimant would not be a candidate to return to the labor market and has a permanent and total disability from a vocational standpoint. He also notes that claimant is legally blind as the result of his diabetes which further complicates the employment situation. The expert vocational testimony of Mr. Dreiling was likewise uncontradicted. Counsel for the Fund argues that because claimant was able to fly to Las Vegas for a weekend and play the slot machines, this shows that he cannot be considered permanently and totally disabled. However, the record is devoid of evidence as to any substantial gainful employment for which claimant retains the ability to perform. The Appeals Board finds claimant to be permanently and totally disabled pursuant to K.S.A. 1990 Supp. 44-510c. The Award by the Administrative Law Judge should be affirmed. The Appeals Board adopts the findings, conclusions and orders of the Administrative Law Judge as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Floyd V. Palmer dated May 21, 1996, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: W. Fredrick Zimmerman, Kansas City, KS
Gerald L. Cooley, Lawrence, KS
Eugene C. Riling, Lawrence, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director